UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA for the use of ENVIRONMENTAL MANAGEMENT, INC.,	)	
Plaintiff	)	
v.	)	***Docket No. 99-33-P-H***
MAINE SF, INC., et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON MOTION OF DEFENDANTS CPM CONSTRUCTORS AND PEERLESS INSURANCE COMPANY FOR SUMMARY JUDGMENT

Two of the four defendants in this action brought under the Miller Act, 40 U.S.C. § 270a *et seq.*, CPM Constructors ("CPM") and Peerless Insurance Company (Peerless"), move for summary judgment on the ground that the plaintiff, Environmental Management, Inc. ("EMI"), failed to comply with the notice requirements of the Miller Act. I recommend that the court grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the

potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following facts are not disputed by the parties to this motion.[1] The United States

[1] The affidavits submitted by the moving defendants in support of their motion and by the plaintiff in opposition are made upon information and belief, contrary to Fed. R. Civ. P. 56(e), which requires affidavits submitted in connection with motions for summary judgment to be made on personal knowledge. No objection has been made to either affidavit on this basis and the court will accordingly credit the statements included in each side's statement of material facts that are supported by citations to these affidavits. In addition, the plaintiff has failed to comply with Local (continued...)

contracted with CPM for work to be performed in a hangar located at the Brunswick Naval Air Station. Affidavit [of Eldon L. Morrison] in Support of Defendant CPM Constructor's [sic] and Peerless Insurance Company's Motion for Summary Judgment ("Morrison Aff.") (Docket No. 10) ¶ 2. CPM, as principal and general contractor, and Peerless, as surety, executed a payment bond for the protection of all persons supplying labor and material for the work to be performed under that contract. *Id.* ¶ 3. CPM subcontracted with defendant Maine SF, Inc. to perform lead abatement, a requirement of the contract between CPM and the government. *Id.* ¶ 4. Maine SF, Inc. obtained a surety bond from defendant Frontier Insurance Company naming CPM as obligee and Frontier as surety for any costs or expenses of suit and damages arising out of the contract between CPM and Maine SF, Inc. *Id.* ¶ 5.

Under the subcontract, Maine SF, Inc. was authorized to hire subcontractors to perform certain duties. *Id.* ¶ 6. The subcontract provided that Maine SF, Inc. was responsible for payment of any subcontractors it hired. *Id.* Maine SF, Inc. subcontracted with EMI for lead site testing. *Id.* ¶ 7. EMI alleges that it has not been paid by Maine SF, Inc. for work performed under its subcontract and is now seeking payment from CPM and Peerless. Complaint ¶¶ 9-14.

EMI personnel performed services directly for CPM between April 3 and April 7, 1998, Affidavit [of John D. Gill] in Support of Plaintiff Environmental Management, Inc. Opposition to Defendants CPM Constructors and Peerless Insurance Company's Motion for Summary Judgment

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[1](...continued)
Rule 56(c), which requires a party opposing summary judgment to submit a separate statement of material facts that admits, denies or qualifies the moving party's statement of material facts by reference to each numbered paragraph in that statement. The defendants have filed no reply to the plaintiff's own statement of material facts, *see* Local Rule 56(d), so all properly supported factual statements included in that document are deemed to be admitted, Local Rule 56(e).

("Gill Aff."), attached to Plaintiff's Opposition to Defendants CPM Constructors and Peerless Insurance Company's Motion for Summary Judgment (Docket No. 12), ¶ 12, but the services for which EMI seeks to recover in this action were performed while CPM and EMI had no direct contractual relationship, Morrison Aff. ¶ 8, Gill Aff. ¶¶ 8-11. EMI last furnished labor or materials to the site on or before February 10, 1998,[2] Morrison Aff. ¶ 9, Gill Aff. ¶ 8, although EMI did not submit its final project report to Maine SF, Inc. until March 4, 1998, Gill Aff. ¶ 9.

On February 6, 1998 Gill hand delivered to George Makosiej, then CPM's site representative, copies of invoices submitted to Maine SF, Inc. by EMI that remained unpaid. Gill Aff. ¶ 5. Makosiej later requested additional copies of the invoices, which were provided by EMI. *Id*. ¶¶ 6-7. On May 15, 1998 EMI contacted Peter Krakoff of CPM by certified mail requesting information on the payment bond supplied to CPM by Peerless. *Id*. ¶ 13.

III. Discussion

The parties agree that the plaintiff's claim against the moving defendants is governed by the Miller Act, which requires persons who contract in an amount exceeding $25,000 to construct, alter or repair any public building or public work of the United States to furnish a bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract." 40 U.S.C. § 270a(a). This action is governed by 40 U.S.C. § 270b, which provides in relevant part:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment

[2] Morrison's affidavit gives this date as 1999, but the contracts and subcontracts in the summary judgment record, as well as the Gill affidavit, suggest that 1998 is the correct year.

> bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided*, *however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop [sic] addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

40 U.S.C. § 270b(a) (emphasis in original).

The defendants contend that they are entitled to summary judgment because EMI did not provide CPM with written notice served as required by the statute. EMI responds that providing copies of the unpaid invoices to CPM constituted substantial compliance with the notice requirement sufficient to allow it to proceed and that its direct contractual relationship with CPM, beginning after the dispute with Maine SF, Inc. arose, exempts it from the statutory notice requirement.

The latter argument is easily disposed of. A later direct contractual relationship between a general contractor and a subcontractor's subcontractor will not endow the subcontractor's already-incurred liability to its subcontractor with direct contractual status sufficient to avoid the notice requirements of section 270b. *United States ex rel. Tonawanda Tank Transp. Serv., Inc. v. Hartford Cas. Ins. Co.*, 738 F. Supp. 44, 45 (D. Mass. 1990).

The first argument presents a closer question. The plaintiff has not presented any evidence that it demanded payment from CPM for the invoices that remained unpaid by Maine SF, Inc. The request for "information on the payment bond" was made more than 90 days after the plaintiff last provided labor or materials under its subcontract with Maine SF, Inc. and therefore cannot serve as evidence of timely notice. *See A. B. Cooley v. Barten & Wood, Inc.*, 249 F.2d 912, 914 (1st Cir. 1957) (construing 90-day period strictly). Resolution of the question of adequate notice thus turns on the presentation of copies of the unpaid invoices to CPM and CPM's request for additional copies of those invoices.

In *United States ex rel. Water Works Supply Corp. v. George Hyman Constr. Co.*, 131 F.3d 28 (1st Cir. 1997), a case not cited by any of the parties, the First Circuit established the legal standard applicable in this court for review of disputes about adequacy of notice under section 270b. Noting that the Miller Act "imposes a strict notice requirement upon suppliers who have a direct contractual relationship with a first-tier subcontractor, but no relationship with the general contractor," 131 F.3d at 31, the First Circuit held as follows:

> The language of the Miller Act requires notice to the general contractor of the amount of the claim and name of the party to whom the material was furnished; it does not expressly require a demand that the general contractor pay. Nevertheless, courts have consistently, and we think correctly, held that the written notice and accompanying oral statements must inform the general contractor, expressly or impliedly, that the supplier is looking to the general contractor for payment so that it plainly appears that the nature and state of the indebtedness was brought home to the general contractor.

Id. at 32 (internal quotation marks and citations omitted). "Communications sent to the general contractor detailing the supplier's claim against the subcontractor may, for example, be supplemented by oral and other written exchanges if these make it unambiguously clear that the

supplier is seeking payment from the general contractor." *Id*. at 33. In that case, the supplier sent copies of unpaid invoices and proof of delivery to the general contractor and asked for a copy of the payment bond for "the express purpose of filing a bond claim," and the general contractor promised to issue joint checks payable to the supplier and the subcontractor as payment for the supplier's materials. *Id*. The First Circuit held that this constituted sufficient notice under the Miller Act. *Id*. at 34.

Here, the summary judgment record contains evidence of only the first of the three events held sufficient in *Water Works*. There is no evidence to support an inference that it was made "unambiguously clear" to CPM that EMI was seeking payment from CPM for its disputed invoices that remained unpaid by Maine SF, Inc. This is concededly a close question. *See United States ex rel Consolidated Elec. Distribs., Inc. v. Altech, Inc.*, 929 F.2d 1089, 1091-93 & n.14 (5th Cir. 1991) (finding sufficient notice where supplier met with general contractor and informed general contractor that subcontractor had not paid an amount owed the supplier, general contractor subsequently wrote letter to supplier noting that general contractor had not yet paid subcontractor but "this situation is being cleared and payment to you should be forthcoming within a few days," and general contractor and supplier presented conflicting evidence on question whether supplier had made explicit oral demand for payment by general contractor during meeting). However, all that appears from the summary judgment record in this case is that EMI informed CPM that Maine SF, Inc. had not paid all of EMI's invoices. It is too great an evidentiary jump to infer from this fact that CPM was thereby unambiguously informed that EMI was looking to CPM for payment of those invoices. Accordingly, I conclude that EMI did not comply with the notice provisions of 40 U.S.C. § 270b(a).

IV. Conclusion

For the foregoing reasons, I recommend that the motion for summary judgment in favor of defendants CPM Constructors and Peerless Insurance Company be **GRANTED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of September, 1999.

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David M. Cohen
United States Magistrate Judge